Lau Jin Heng Realty Sdn Bhd v Geotechnique East (M) Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 11–09 OF 2006–III
DAVID WONG JC
15 FEBRUARY 2007

Civil Procedure — Appeal — Magistrate's Court — Facts, finding of — Interference by appellate court — Contemporary documentary evidence — Documentary evidence not challenged — Witness not called — Whether magistrate's decision was so unreasonable that no reasonable tribunal would have come to that conclusion

This was an appeal by the appellant against the learned magistrate's decision, where he gave judgment to the respondent in the sum of RM10,600 together with interests thereon at the rate of 2% per month from 19 October 1997 until the full settlement of the judgment sum. The amount claimed was for fees in respect of a second soil test conducted by the respondent.

Held, dismissing appeal with cost to be taxed:

An appellate court should be slow in disturbing finding of facts by the trial judge unless the decision is so unreasonable that no reasonable tribunal would have come to that conclusion or was plainly wrong. The learned magistrate had come to the conclusion that the second soil test was done pursuant to the appellant's instruction. He based his conclusion on documentary evidences tendered in court. Those documentary evidences were not challenged. Further the consultant had accepted the second soil test without any complaints to the appellant. The appellant's defense may have some merit had they called the consultant as a witness. This was not done which showed that the defense was merely a bare assertion. In respect of the appellant's assertion that the respondent ought to have sued the main contractor, the learned magistrate was correct to conclude that the facts did not allow him to come to that conclusion. He was also correct to conclude that this was not pleaded in the defense. Accordingly, the learned magistrate's decision was not so unreasonable that no reasonable tribunal would have come to that conclusion. In fact it was a well reasoned decision (see paras 7–8).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan majistret yang bijaksana yang mana beliau memberikan penghakiman kepada responden dalam jumlah RM10,600 bersama-sama dengan faedah ke atasnya pada kadar 2% sebulan daripada 19 Oktober

1997 sehingga penyelesaian penuh jumlah penghakiman. Jumlah yang dituntut adalah yuran berkenaan dengan ujian tanah kedua yang dilakukan oleh responden.

Diputuskan, menolak rayuan dengan kos untuk ditaksirkan:

Mahkamah rayuan seharusnya perlahan dalam mengganggu dapatan fakta oleh hakim icara melainkan keputusan adalah begitu tidak munasabah yang mana tiada tribunal yang munasabah boleh hadir kepada keputusan tersebut atau dengan jelasnya adalah salah. Majistret yang bijaksana telah membuat kesimpulan bahawa ujian tanah kedua telah dilakukan menurut arahan perayu. Beliau membuat kesimpulan berdasarkan kepada keterangan dokumentari yang dikemukakan kepada mahkamah. Keterangan dokumentar tersebut adalah tidak dicabar. Selanjutnya, pakat perunding telah menerima ujian tanah kedua tanpa sebarang aduan kepada perayu. Pembelaan perayu mungkin mempunyai sedikit merit jika memanggil pakar perunding sebagai saksi. Ini tidak dilakukan yang mana menunjukkan bahawa pembelaan hanyalah kenyataan kosong. Berkenaan dengan kenyataan perayu bahawa responden sepatutnya mendakwa kontraktor utama, majistret yang bijaksana adalah benar menyimpulkan bahawa faktanya tidak membenarkannya membuat kesimpulan. Beliau juga benar dalam menyimpulkan bahawa ini tidak dipidkan di dalam pembelaan. Sewajarnya, keputusan majistret yang bijaksana bukanlah tidak begitu munasabah yang mana tiada tribunal yang munasabah akan membuat kesimpulan tersebut. Malahan ianya adalah keputusan yang benar-benar munasabah (lihat perenggan 7–8).]

Notes

For a case on magistrate's court, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1049.

Cases referred to

APV Hill & Mills Sdn Bhd v AQ-Pacific Wide Sdn Bhd & Anor [2006] 3 MLJ 235 (refd)

Ching Yuen Tung v Bep Akettik [1978] 1 MLJ 211 (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors Gan [2005] 2 MLJ 1 (refd)

Low Cheng Soon v TA Securities Sdn Bhd [2003] 1 MLJ 389 (refd)

Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd Tansa Enterprise [1994] 2 MLJ 353 (refd)

Appeal from: Magistrate's Court Case No 72–9 of 2000–B (High Court, Kuching)

Ivan Hussien (Ivan Hussien Advocates) for the appellant.
Wejok Tomik (Reddi & Co) for the respondent.

David Wong JC:

GROUNDS OF DECISION

[1] Before me is an appeal by the defendant/appellant (appellant) against the learned magistrate's decision dated 5 November 2004 after a full trial, where he gave

judgment to the plaintiff/respondent (respondent) in the sum of RM10,600 together with interests thereon at the rate of 2% per month from 19 October 1997 until the full settlement of the judgment sum. The amount claimed was for fees in respect of a second soil test conducted by the plaintiff. A

[2] Counsel for the appellant, Mr Ivan Hussien ('En Hussien') in substance submitted two grounds for my consideration and they are: B

(1) The learned magistrate erred in law and fact when he found that the second soil test was done pursuant to the instruction of the appellant; and

(2) The learned magistrate erred in law in awarding 2% per month on the sum of RM10,600 from 19 October 1997 until the full settlement of the aforesaid sum. C

[3] At the start of the hearing of this appeal, learned counsel for the respondent, Mr Wejok Tomik ('Mr Tomik') raised a preliminary objection to this appeal which relates to the failure of the appellant's counsel's failure to include exhs P23(a)–(k) and P24(a)–(w) in the record of appeal and relied on the case of *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389 where the Court of Appeal held (at pp 394–395): D

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> In our judgment, the importance of the rules of court cannot be ignored as otherwise the courts will be faced with endless problems involving the administration of justice. Speaking of the importance of the rules of court, the learned judge, Chang Min Tat J (as he then was) in *Yu Oi Yong & Anor v Ho Toong Peng & Ors* [1977] 1 MLJ 120 had this to say (at p 121):
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> > There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules. F
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> > It should, I think, be realized by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice … G
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> ... Coming back to the instant appeal before us and for the reasons we have already mentioned earlier we would uphold the preliminary objection. We do so not because there is mere non-compliance with the Rules but rather because of the consequence which resulted from such non-compliance, ie a huge chunk of exhibits have been left out of the appeal record. Despite being informed by learned counsel for the respondent of his objection the appellant showed no response, an attitude which in our opinion amounted to a blatant disregard for the Rules. There was also no attempt made by the appellant to apply for leave to file a supplementary appeal record. Such application, if made would have easily met our approval. H I
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> Unfortunately nothing was done. We would therefore conclude that this appeal is not properly brought before us and on that finding we dismiss it with costs and order that the deposit be paid to the respondent to account of its taxed costs.

[4] The dicta of the just quoted case are binding on me and if the preliminary objection was pursued I may be forced to strike out the appeal. However to the credit of Mr Tomik, he informed the court that if En Hussien undertook to file a supplementary record of appeal, he would not pursue his preliminary objection and would let the court to look at the merits of the appeal. The conduct of Mr Tomik must be commended as these days such conduct are far and few in between. Encik Hussien had since filed in the supplementary record of appeal.

[5] I now look at the substance of the appeal. Before I look at the two grounds set out earlier, I am of the view that this appeal concerns a finding of fact by the learned magistrate and in such circumstances, the law is that an appellate court should be slow in disturbing finding of facts by the trial judge unless the decision is so unreasonable that no reasonable tribunal would have come to that conclusion. (See *APV Hill & Mills Sdn Bhd v AQ-Pacific Wide Sdn Bhd & Anor* [2006] 3 MLJ 235) or was plainly wrong (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors Gan* [2005] 2 MLJ 1).

[6] So the question which I need to address is whether or not the learned magistrate had made such a decision.

[7] In respect of first ground, the learned magistrate had at pp 97–101 of the record of appeal dealt with it and came to the conclusion that the second soil test was done pursuant to the defendant's instruction. He based his conclusion on documentary evidences tendered in court. Those documentary evidences were not challenged and had the learned magistrate not taken them into consideration, he would have failed in his duty to judiciously evaluate the evidences before him. Further the consultant had accepted the second soil test without any complaints to the defendant. The defendant's defense may have some merit had they called the consultant as a witness. This was not done which only shows that the defense was merely a bare assertion. In respect of the defendant's assertion that the plaintiff ought to have sued the main contractor, the learned magistrate was correct to conclude that the facts did not allow him to come to that conclusion and rightly relied on the case of *Ching Yuen Tung v Bep Akettik* [1978] 1 MLJ 211. He was also correct to conclude that this was not pleaded in the defense.

[8] Accordingly and after also having carefully scrutinized the record of appeal, I do not find that the learned magistrate's decision was so unreasonable that no reasonable tribunal would have come to that conclusion. In fact it was a well reasoned decision.

[9] In respect of second ground, suffice for me only to refer to the case of *Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd Tansa Enterprise* [1994] 2 MLJ 353 where Haidar J (as he then was) said at p 365:

> In respect of the claim of interest of 1.5% per month for overdue accounts by the plaintiff the defendant cannot deny this claim as it has full knowledge of this as clearly indicated in the invoices submitted to it by the plaintiff and there was no protest of this claim at all when the invoices were presented to the defendant. I am therefore of the view that the plaintiff is entitled to claim such interest. It is similarly not a triable issue at all.

[10] Similarly here, the defendant raised no objection to the invoice and as such cannot now deny their liability to pay the interests imposed. Debtors must realize that when creditors are deprived of the money rightfully due to them they too suffer as they incur interests from their overdraft accounts.

[11] Accordingly, this appeal is dismissed with costs to be taxed unless agreed to the respondent.

Appeal dismissed with costs.

Reported by Peter Ling